

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the matter of:	)	
Petition of All Granite & Marble Corp. for	)	
Declaratory Ruling to Clarify Scope and/or	)	
Statutory Basis for Rule 64.1200(a)(3)(iv)	)	CG Docket No. 02-278
and/or for Waiver	)	
	)	CG Docket No. 05-338
	)	
	)	

**PETITION OF ALL GRANITE & MARBLE CORP. FOR DECLARATORY RULING  
AND/OR WAIVER**

Pursuant to Section 1.2 of the Federal Communications Commission (“Commission” or “FCC”) rules<sup>1</sup>, Petitioner All Granite & Marble Corp. (hereinafter “Petitioner” or “All Granite”) respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules does not apply to fax advertisements sent with the prior express consent or permission of the recipient (“solicited faxes”). In the alternative, Petitioner respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). If the Commission declines to issue either declaratory ruling, Petitioner respectfully requests that, pursuant to Section 1.3 of the Commission’s rules<sup>2</sup>, the Commission grant retroactive waivers of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients.

**I. Introduction and Summary**

All Granite is a small business owner that is currently facing a class action lawsuit in the District of Nebraska seeking, what could be, millions of dollars in damages because it sent faxes

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<sup>1</sup> 47 C.F.R. § 1.2.

<sup>2</sup> 47 C.F.R. § 1.3.

to granite fabricators, some of which had expressly consented to receive them. (Complaint, American Tile and Marble Co. v. All Granite & Marble Corp., No. 13-cv-00089 (D.Neb.), a copy of which is attached hereto as “**Exhibit A.**”) The basis for the lawsuit is the Telephone Consumer Protection Act (“TCPA” or the “Act”), which prohibits sending an “unsolicited advertisement” by fax and provides a private cause of action for violation of the statute or implementing rules promulgated by the Commission. The plaintiff suing All Granite (hereinafter “plaintiff” or “American Tile”) relies on a regulation, Rule 64.1200(a)(4)(iv), issued by the Commission in an order implementing amendments to the TCPA. That regulation requires that certain opt-out language appear on faxes, but its scope is unclear. It is part of a rule expressly limited to unsolicited faxes, but confusingly also references recipients that have agreed to receive such faxes. Uncertainty as to the meaning of Rule 64.1200(a)(4)(iv), as well as whether it should be considered grounded in the TCPA, have led to disputes across the country and numerous petitions filed with this Commission.

Petitioner, like many others, asks the Commission to resolve this uncertainty by clarifying that Rule 64.1200(a)(4)(iv)’s ambiguous language should be limited to unsolicited faxes, as that reading best accords with the TCPA’s language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. Alternatively, Petitioner asks the Commission to clarify that the statutory basis for Rule 64.1200(a)(4)(iv) is not the TCPA. Through either of these actions, the Commission can ensure that its rules are consistent with Congress’ intent, in addition to providing much needed guidance to courts and litigants. If the Commission declines to issue either declaratory ruling, Petitioner asks for retroactive waivers of Rule 64.1200(a)(4)(iv) with respect to the Petitioner’s solicited faxes. Neither the Commission’s goals nor the public interest

are served by subjecting Petitioner's small business to a million dollar lawsuit from plaintiffs who have suffered no actual harm.

## **II. Background**

The TCPA, 47 U.S.C. §§ 227(a)(5) and (b)(1)(C), prevents the use of a telephone facsimile machine to send an "unsolicited advertisement." Since the passage of the TCPA in 1991, Congress has exempted solicited fax advertisements from regulation under the Act. Specifically, the TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* § 227(a)(5). Through its enactment of the Junk Fax Prevention Act of 2005 ("JFPA"), Congress amended the TCPA to permit the transmission of unsolicited faxes to a person with whom the sender has an established business relationship ("EBR") so long as such an advertisement contains an "opt-out" notice. *Id.* § 227(b)(1)(C)(i)-(iii). Importantly, however, the TCPA, as amended, continues to cover only fax advertisements that are transmitted without an individual's "express invitation or permission." Thus, by its terms, the TCPA's general prohibition against fax advertisements and the exception to that prohibition (allowing faxes sent pursuant to an EBR if they contain an appropriate opt-out notice) simply do not apply to faxes transmitted with a recipient's prior express consent.

Following the passage of the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order ("JFPA Order") that "amend[ed] the Commission's rules on unsolicited facsimile advertisements."<sup>3</sup> Despite the TCPA's express limitation to unsolicited faxes, one of the rules adopted by the Commission, Section

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<sup>3</sup> In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("JFPA Order"); see also JFPA NPRM, 20 FCC Rcd 19,758.

64.1200(a)(4)(iv), references opt-out notices for faxes “sent to a recipient that has provided prior express invitation or permission.” 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added). The scope of that provision is unclear, however, as it is confusingly worded as part of a rule that also references unsolicited faxes. See id. The JFPA Order also contains contradictory language regarding the scope of Section 64.1200(a)(4)(iv), simultaneously explaining that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements” and that an opt-out notice is required for solicited faxes “to allow consumers to stop unwanted faxes in the future.”<sup>4</sup> The administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes.

Meanwhile, Rule 64.1200(a)(4)(iv) has had unintended and unjust consequences, subjecting Petitioner—and numerous others—to lawsuits seeking damages for engaging in consensual communications that are entirely permissible under the TCPA. Indeed, notwithstanding the fact that solicited faxes are expressly excluded from coverage under the TCPA, plaintiffs suffering no actual harm have seized upon Section 64.1200(a)(4)(iv)’s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action to recover statutory damages based on a violation of “this subsection or the regulations prescribed under this subsection.” Many of these lawsuits—usually presented as class actions—seek millions of dollars in damages, despite the fact that many of the plaintiffs agreed to receive the faxes. Instead, these suits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that the plaintiffs deem inadequate.

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<sup>4</sup> JFPA Order, 21 FCC Rcd at 3810, 3812, ¶¶ 42 n.154, 48.

Petitioner is a defendant in one such suit. All Granite is a business that fabricates and installs natural stone countertops in the eastern part of the United States. All Granite created a service referred to as the “Lead System” for U.S.-based natural stone fabricators who wanted to expand their customer base and obtain new business opportunities. All Granite has an “Online Estimate Tool,” which allows potential customers to log into its website and price products that interest them. However, many potential customers are located outside of All Granite’s operating area and, per All Granite’s Lead System service, those customers had the ability to request a price through the Lead System. The Lead System was comprised of fabricators, some of whom signed up on All Granite’s website to obtain notification of such leads. The plaintiff American Tile and Marble received one such lead via a facsimile transmission.<sup>5</sup> The facsimile contained an opt-out provision, but the plaintiff has argued that it is insufficient under 47 C.F.R. §§ 64.1200(a)(3)(iii) and (iv). The opt-out provision stated that “[t]o unsubscribe, send fax back to (860) 760-6834 or email to [ls@marble.com](mailto:ls@marble.com).” (The facsimile is attached to the Complaint, which is attached hereto as “Exhibit A.”) The plaintiff seeks to have a class action certified.

The issue of whether Section 64.1200(a)(4)(iv) applies to solicited faxes is the subject of a recent Eighth Circuit Court of Appeals decision, Nack v. Walburg, 715 F.3d 680 (8<sup>th</sup> Cir. 2013). In that case, the Eighth Circuit recognized that “it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action,” but the court found that the Hobbs Act precluded it from holding the regulation invalid outside of the statutory procedure mandated by Congress. Id. at 689. The court indicated that the defendant therein might obtain relief from the Commission. Id.

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<sup>5</sup> American Tile and Marble has alleged that the fax was unsolicited, but All Granite asserts that the fax was solicited.

at 687. Subsequently, the defendants in Nack (Walburg and Richie Enterprises) moved to stay the litigation and filed a Petition for Declaratory Ruling and/or Waiver with the Commission.

Concurrently with this Petition, for substantially the same reasons set forth in Walburg and Richie Enterprises' Petition, Petitioner here has moved to stay the litigation and likewise asks the Commission to issue a Declaratory Ruling to clarify that fax advertisements transmitted after express consent was obtained from the recipient are not required to contain an opt-out notice, and/or that the Commission retroactively waive Section 64.1200(a)(4)(iv) for fax advertisements sent since the effective date of the Rule for which Petitioner obtained prior express consent.

### **III. Argument**

#### **A. The Commission Should Issue a Declaratory Ruling to Clarify That Fax Advertisements Transmitted After Express Consent Was Obtained Are Not Required to Contain An Opt-Out Notice**

The Commission has the “sound discretion” to issue a declaratory ruling in order to “terminate a controversy or remove uncertainty,” 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a), and should do so in this case due to significant controversy and uncertainty over the scope of and statutory basis for Section 64.1200(a)(4)(iv). That uncertainty is confirmed both by the number of lawsuits that have proliferated across the country involving solicited faxes and the numerous petitions that have been filed with the Commission.<sup>6</sup>

As set forth in In re Walburg, the Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes for at least three reasons: (1) the Commission exceeded its statutory authority set forth in 47 U.S.C. § 227(b)(2); (2) the plain language of the rule and the

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<sup>6</sup> See Petition for Declaratory Ruling and/or Waiver at p.7 fn. 19, In re Walburg (FCC Aug. 19, 2013).

order promulgating that rule is ambiguous as to the provision's scope; and (3) applying Rule 64.1200(a)(4)(iv) violates the First Amendment.

### **1. The Commission's Regulation Exceeds Its Statutory Authority**

The Commission exceeded its statutory authority in enacting Rule 64.1200(a)(4)(iv). The FCC, like other federal agencies, “literally has no power to act . . . unless and until Congress confers power upon it.” La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). The Commission “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” Michigan v. EPA, 268 F.3d 1075, 1081 (D.C.Cir. 2001). Accordingly, the FCC's power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. Id. (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

Here, Section 227(b)(2) of the Act grants the Commission the authority to issue regulations, but the regulations are limited to implementing “the requirements of this subsection.” The requirements of “this subsection,” 47 U.S.C. §227(b)(2), do not provide that the Commission “shall” or “may” issue regulations pertinent to solicited faxes. Instead, Section 227(b)(2)(D) provides that the Commission “shall provide that a notice contained in an unsolicited advertisement complies with the requirements of this subparagraph” if certain conditions are met. This Section does not address solicited advertisements. Id. (emphasis added). Thus, interpreting Rule 64.1200(a)(4)(iv) to apply to *solicited* faxes would render that regulation unlawful because it exceeds the Commission's delegated authority. See, e.g., Am. Library Ass'n v. FCC, 406 F.3d 689, 715 (D.C.Cir. 2005).

## **2. The Rule Must Be Clarified To Apply Only to Unsolicited Faxes Because It Is Ambiguous**

The Rule is unclear as drafted. The Rule provides that “[n]o person or entity may,” “use a telephone or facsimile machine . . . unless,” “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. § 64.1200(a)(4)(iv). But, as set forth in In re Walburg, the structure simply does not make sense and, confounding this ambiguity, is the fact that the Rule applies to recipients that have “provided prior express invitation” or have provided “permission,” but does explain the difference and does not expressly state “solicited” faxes. Given this ambiguity, the Commission should interpret this Rule to apply only to unsolicited faxes.

## **3. Applying Rule 64.1200(a)(4)(iv) to Solicited Faxes Violates the First Amendment**

Applying Section 64.1200(a)(4)(iv) to faxes sent with prior express consent would violate the First Amendment. Truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation “is not more extensive than is necessary to serve that interest.” Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 556 (1980). Here, there is no indication whatsoever that the government has a substantial interest in restricting solicited, as opposed to unsolicited, fax advertisements. Thus, while the government may have a substantial interest in restricting unsolicited fax advertisements in order to “prevent the cost shifting and inference such unwanted advertising places on the recipient,” no such substantial interest has been established as to solicited advertisements. Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 655 (8th Cir. 2003) (addressing constitutionality of unsolicited fax advertisements, but not addressing solicited fax advertisements). It is the government’s burden to develop a



record sufficient to justify an interest in solicited facsimiles, but has failed to do so. See, e.g., Greater New Orleans Broad Ass’n, Inc. v. U.S., 527 U.S. 173, 188 (1999); Edgefiled v. Fane, 507 U.S. 761, 770-71.

**B. Assuming Arguendo That The Commission Declines to Issue A Declaratory Ruling Clarifying That Rule 64.1200(a)(4)(iv) Does Not Apply to Solicited Faxes, The Commission Should Clarify That the Statutory Basis for the Rule is Not 47 U.S.C. § 227(b)**

As set forth above, the statutory basis for Rule 64.1200(a)(4)(iv) is not found in 47 U.S.C. § 227(b) and the Commission, at a minimum, should clarify that. Such a ruling does not limit the Commission’s authority for issuance of that Rule, as the Commission has cited eleven (11) different statutes as authority for promulgating Rule 64.1200(a)(4)(iv). In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005 (“JFPA Order”), 21 F.C.C. Rcd. 3787, 3817, 2006 WL 901720, ¶ 64 (Apr. 6, 2006) (finding that “pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318 . . .”).

Clarification is important because Section 227(b) provides for a private right of action for “a violation of this subsection or the regulations prescribed under this subsection,” and allows for the recovery of actual monetary loss or \$500 per violation, whichever is greater, and treble damages for willful and knowing violations. 47 U.S.C. § 227(b)(3). Purported violations predicated on insufficiency of opt-out provisions in solicited faxes have proliferated, which burdens the courts and threatens business *without a substantial governmental interest*. Clarification that the promulgation of Rule 64.1200(a)(4)(iv) was not based on the authority

found in 47 U.S.C. § 227(b) would help ensure the “fair treatment for persons affected by [this] rule,” and would assist in curtailing the massive litigation surrounding this issue.

**C. Assuming Arguendo That The Commission Declines to Issue A Declaratory Ruling, Petitioner Respectfully Requests a Retroactive Waiver of Rule 64.1200(a)(4)(iv)**

Should the Commission decline to issue a declaratory ruling, the Petitioner respectfully asks that the Commission grant it a retroactive waiver of Rule 64.1200(a)(4)(iv) for the solicited fax advertisements that it sent subsequent to the adoption of the Rule (April 2006). Section 1.3 of the Commission’s Rules allow it to waive any provision of its Rules “on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3. Here, good cause exists because, as to the faxes that Petitioner sent at the request of the recipient, the Petitioner provided an opt-out notice and there are no allegations that the recipients were unaware that they could opt-out or that the request would not be honored. Thus, to the extent that Rule 64.1200(a)(4)(iv) is intended “to allow consumers to stop unwanted faxes in the future,” as the Commission expressed in the JFPA Order, the underlying purpose of the Rule has been effectuated here. See JFPA Order, ¶ 48. And, on the other hand, strict compliance with the Rule would be inequitable, as it would subject Petitioner to a class action lawsuit, the damages for which could total millions of dollars.

**IV. Conclusion**

Petitioner respectfully requests that the Commission, first, issue a declaratory ruling clarifying that Rule 64.1200(a)(4)(iv) does not apply to solicited fax advertisements. Second, alternatively, Petitioner respectfully requests that the Commission issue a declaratory ruling clarifying that 47 U.S.C. § 227(b) is not the statutory basis for promulgation of 64.1200(a)(4)(iv). Third, in the event that the Commission declines the former two requests, the

Petitioner asks that the Commission grant it a retroactive waiver of Rule 64.1200(a)(4)(iv) for any faxes sent by Petitioner with the recipient's prior express consent.

DATED this 28<sup>th</sup> day of October, 2013.

ALL GRANITE & MARBLE CORP.,  
Petitioner

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

AMERICAN TILE AND MARBLE CO., on behalf of )	)	
Itself and all others similarly situated, )	)	
	)	<b>Case No.:</b>
Plaintiffs, )	)	
	)	
v. )	)	<b>CLASS ACTION COMPLAINT</b>
	)	<b>and JURY DEMAND</b>
ALL GRANITE & MARBLE CORP., )	)	
	)	
Defendant. )	)	

**COMPLAINT**

**CLASS ACTION**

1. American Tile And Marble Co. (hereinafter "Plaintiff") is bringing this action against All Granite & Marble Corp. (hereinafter "Defendant") for violating the Telephone Consumer Protection Act (hereinafter "the TCPA"), 47 U.S.C. § 227 (hereinafter "the TCPA"), and the regulations promulgated thereunder.

2. Congress enacted the TCPA in 1991 to prevent the faxing of unsolicited advertisements to persons who had not provided express invitation or permission to receive such faxes. Congress believed that unsolicited fax advertisements improperly shift advertising costs to the unwilling fax recipients and interfere with the use of fax machines by these recipients, who are consumers and businesses.

3. Defendant, or some person authorized to do so on its behalf, has recently caused to be sent out one or more "blasts" of unsolicited fax advertisements throughout the United States for goods and/or services without the proper opt-out notice required by the TCPA and the regulations promulgated thereunder (hereafter "opt-out notice").

**JURISDICTION AND VENUE**

4. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

5. Venue in this judicial district is proper under 28 U.S.C. §1391(b)(2) because a substantial part of the events or omissions giving rise to the claims in this case occurred in this District.

#### **PARTIES**

6. Plaintiff is a Nebraska corporation with its principal place of business in Omaha, Nebraska.

7. Upon information and belief, Defendant is a New Jersey Corporation. Upon information and belief, it is located at 1A Mount Vernon St., Ridgefield Park, New Jersey, 07660. It operates or is affiliated with the internet website [www.marble.com](http://www.marble.com), and appears to have a business model whereby it sends unsolicited "leads" obtained through that website, via fax, to local businesses.

#### **FACTS**

8. Plaintiff still has and had at all relevant times to this action telephone service at XXX-XXX-1908 at its place of business at 4623 S. 28<sup>th</sup> Street, Omaha, Nebraska. Plaintiff receives facsimile transmissions (hereinafter "faxes") at this number, using a telephone facsimile machine (hereinafter "fax machine").

9. Upon information and belief, on or about November 21, 2012, Defendant, without Plaintiff's express invitation or permission, arranged for and/or caused a telephone facsimile machine, computer, or other device to send an unsolicited fax advertisement, advertising the commercial availability or quality of any property, goods, or services, to

Plaintiff's fax machine located at its principal place of business. A copy of the fax advertisement is attached hereto as Exhibit A and is incorporated herein by reference.

10. Exhibit A was wholly unsolicited in that it was sent to Plaintiff by Defendant without Plaintiff's express invitation or permission.

11. Upon information and belief, Defendant either negligently or willfully and/or knowingly arranged for and/or caused the attached fax advertisement to be sent to Plaintiff's fax machine.

12. Upon information and belief, Defendant has, from four years prior to the date of the filing of the instant Complaint through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent hundreds, or thousands, of unsolicited fax advertisements, advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to hundreds of persons throughout the United States, which contained a deficient opt-out notice.

**THE FEDERAL STATUTE AND THE REGULATIONS THEREUNDER**

13. The Telephone Consumer Protection Act of 1991, Pub. L. 102-243, § 3(a), added Section 227 to Title 47 of the United States Code, 47 U.S.C. § 227.

14. In pertinent part, 47 U.S.C. § 227(b) provides "[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]"

15. 47 U.S.C. § 227(b)(1)(C)(iii) provides that it is unlawful to send an unsolicited facsimile advertisement unless, among other things, the unsolicited facsimile advertisement contains a notice meeting the requirements under 47 U.S.C. § 227(b)(2)(D).

16. In pertinent part, 47 C.F.R. § 64.1200(a), a regulation prescribed under 47 U.S.C. § 227(b) and effective as of December 20, 1992, provides that "No person may . . . [u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

17. 47 C.F.R. § 64.1200(a)(3)(iv) provides that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section."

18. 47 C.F.R. § 64.1200(a)(3)(iii) provides that no person or entity may:

Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--:

\* \* \*

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) **The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful;**

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(3)(v) of this section;

(D) The notice includes--

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and  
(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

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(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if-

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine. [Emphasis added.]

19. Defendant's faxes do not comply with the opt out requirements. For example, the opt out on Exhibit A omits language that states that "the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph 47 C.F.R. §64.1200(a)(3)(v) of this section is unlawful." Nor do they include the requirements mandated by 47 C.F.R. §64.1200(a)(3)(iii)(C) necessary to comply with a request to not send future unsolicited advertisements, as delineated in 47 C.F.R. §64.1200](a)(3)(v).



20. As used in both 47 U.S.C. § 227 and 47 C.F.R. § 64.1200, "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

### **CLASS ALLEGATIONS**

21. Plaintiff brings this class action on behalf of itself and all others similarly situated under rules 23(a) and 23(b)(2) & (b)(3) of the Federal Rules of Civil Procedure.

Class A: All persons in the United States from four years prior to the date of the filing of the instant Complaint through the date of the filing of the instant Complaint to whom Defendant sent or caused to be sent an unsolicited facsimile advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice.

Class B: All persons in the United States from four years prior to the date of the filing of the instant Complaint through the date of the filing of the instant Complaint to whom Defendant sent or caused to be sent a facsimile advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained a purported opt out notice that did not substantially notify the recipient that "the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful."

22. Classes A and B are hereinafter referred to collectively as "the Classes".

23. Numerosity: The Classes are so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court.

24. Upon information and belief there are, at a minimum, hundreds of class members of Classes A and B.

25. Upon information and belief, the Classes' sizes and the identities of the individual members thereof are ascertainable through Defendant's records, including, but not limited to Defendant's fax and marketing records.

26. Members of the Classes may be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notice, fax notice, first class mail, or combinations thereof, or by other methods suitable to this class and deemed necessary and/or appropriate by the Court.

27. Typicality: Plaintiff's claims are typical of the claims of the members of Class A. The claims of the Plaintiff and members of Class A are based on the same legal theories and arise from the same unlawful conduct.

28. Plaintiff and members of Class A each received at least one fax advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice, which Defendant sent or caused to be sent to Plaintiff and the members of Class A without Plaintiff's and the members of Class A's express permission or invitation.

29. Plaintiff's claims are typical of the claims of the members of Class B. The claims of the Plaintiff and members of Class B are based on the same legal theories and arise from the same unlawful conduct.

30. Plaintiff and members of Class B each received at least one fax advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice, which Defendant sent or caused to be sent to Plaintiff and the members of Class B.

31. Common Questions of Fact and Law: There is a well-defined community of common questions of fact and law affecting the Plaintiff and members of the Classes.

32. The questions of fact and law common to Plaintiff and Class A predominate over questions which may affect individual members and include the following:

(a) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class A fax advertisements without Plaintiff's and members of class A's express invitation or permission, which advertised the commercial availability or quality of any property, goods, or services and contained no purported opt out notice, by facsimile, computer or other device violated 47 U.S.C. § 227(b) and/or the regulations thereunder;

(b) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class A fax advertisements without Plaintiff's and members of class A's express invitation or permission, which advertised the commercial availability or quality of any property, goods, or services and contained no purported opt out notice, by facsimile, computer or other device, was knowing or willful;

(c) Whether Plaintiff and the members of Class A are entitled to statutory damages, triple damages and costs for Defendant's acts and conduct; and

(d) Whether Plaintiff and members of Class A are entitled to a permanent injunction enjoining Defendant from continuing to engage in its unlawful conduct.

33. The questions of fact and law common to Plaintiff and Class B predominate over questions which may affect individual members and include the following:

(a) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class B fax advertisements, which advertised the commercial

availability or quality of any property, goods, or services and which contained no purported opt out notice, by facsimile, computer or other device violated 47 U.S.C. § 227(b) and/or the regulations thereunder;

(b) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class B fax advertisements, which advertised the commercial availability or quality of any property, goods, or services and which contained no purported opt out notice, by facsimile, computer or other device, was knowing or willful;

(c) Whether Plaintiff and the members of Class B are entitled to statutory damages, triple damages and costs for Defendant's acts and conduct; and

(d) Whether Plaintiff and members of Class B are entitled to a permanent injunction enjoining Defendant from continuing to engage in its unlawful conduct.

34. Adequacy of Representation: Plaintiff is an adequate representative of the Classes because Plaintiff's interests do not conflict with the interests of the members of the Classes. Plaintiff will fairly, adequately and vigorously represent and protect the interests of the members of the Classes and has no interests antagonistic to the members of the Classes. Plaintiff has retained counsel who are competent and experienced in litigation in the federal courts, TCPA litigation and class action litigation.

35. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the Classes. While the aggregate damages which may be awarded to the members of the Classes are likely to be substantial, the damages suffered by individual members of the Classes are relatively small. As a result, the expense and burden of

individual litigation makes it economically infeasible and procedurally impracticable for each member of the Classes to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced against Defendant by any member of the Classes. The likelihood of the individual members of the Classes prosecuting separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the Classes. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

36. Injunctive Relief: Defendant has acted on grounds generally applicable to Plaintiff and members of Classes A and B, thereby making appropriate final injunctive relief with respect to Plaintiff and Classes A and B as a whole.

**COUNT I – UNSOLICITED FACSIMILE ADVERTISEMENT**

37. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

38. By Defendant's conduct, described above, Defendant committed thousands of violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class A, to wit: the fax advertisements Defendant sent and/or caused to be sent to Plaintiff and the members of Class

A were unsolicited and did not contain a notice meeting the requirements of 47 U.S.C. § 227(b)(2)(D) and/or 47 C.F.R. § 64.1200(a)(4);

39. Accordingly, Plaintiff and the members of Class A are entitled to statutory damages under 47 U.S.C. § 227(b).

40. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent unsolicited fax advertisements which did not contain a notice meeting the requirements of 47 U.S.C. § 227(b)(2)(D) and/or 47 C.F.R. § 64.1200(a)(4) to Plaintiff and the members of Class A, Plaintiff requests an increase by the Court of the damage award against Defendant, described in the preceding paragraph, to three times the amount available under 47 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3) for willful or knowing violations.

WHEREFORE, plaintiff prays that the Court enter judgment in favor of it and Class A and against defendant, for:

A. An order certifying the Classes and appointing Plaintiff as the representative of the Classes and appointing the law firms representing Plaintiff as counsel for the Classes;

B. An award to Plaintiff and the members of Classes A and B of statutory damages, pursuant to 47 U.S.C. § 227(b), for Defendant's violations of that statute.

C. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent fax advertisements to classes A and/or B, an increase by the Court of the award of statutory damages pursuant to 47 U.S.C. § 227(b) prayed for to three

times that amount described in the previous paragraph, as authorized by 47 U.S.C. § 227(b)(3), for willful and/or knowing violations.

D. An injunction against Defendant, prohibiting Defendant from committing further violations of the TCPA and the regulations promulgated thereunder;

E. Such other and further relief as the Court may deem just and proper.

**COUNT II – IMPROPER/INCOMPLETE OPT OUT NOTICE**

41. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

42. Through its conduct described above, Defendant committed hundreds or thousands of violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class B to wit: the fax advertisements Defendant sent and/or caused to be sent to Plaintiff and the members of Class B were either unsolicited and did not contain a proper notice meeting the requirements of 47 C.F.R. § 64.1200(a)(4).

43. Accordingly, Plaintiff and the members of Class B are entitled to statutory damages under 47 U.S.C. § 227(b).

44. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent fax advertisements to Plaintiff and the members of Class B and the aforementioned advertisements were either unsolicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii) and/or 47 U.S.C. § 227(b)(2)(D), or were solicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii), as required by 47 C.F.R. § 64.1200(a)(3)(iv), Plaintiff requests an increase by the Court of the damage award against Defendant, described in the preceding paragraph, to three times the amount available

under 47 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3) for willful or knowing violations.

WHEREFORE, plaintiff prays that the Court enter judgment in favor of it and Class A and against defendant, for:

A. An order certifying the Classes and appointing Plaintiff as the representative of the Classes and appointing the law firms representing Plaintiff as counsel for the Classes;

B. An award to Plaintiff and the members of Classes A and B of statutory damages pursuant to 47 U.S.C. § 227(b), for Defendant's violations of that statute.

C. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent fax advertisements to classes A and/or B, an increase by the Court of the award of statutory damages pursuant to 47 U.S.C. § 227(b) prayed for to three times that amount described in the previous paragraph, as authorized by 47 U.S.C. § 227(b)(3), for willful and/or knowing violations.

D. An injunction against Defendant, prohibiting Defendant from committing further violations of the TCPA and the regulations promulgated thereunder;

E. Such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff requests a trial by jury.



Dated this 18<sup>th</sup> day of March, 2013.

AMERICAN TILE AND MARBLE CO., on  
behalf of itself and all other similarly  
situated, Plaintiffs

By: /s/ Burke Smith  
Burke Smith, #19883  
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Omaha, NE 68114  
(402) 718-8865  
(402) 218-4391 fax  
E-mail: Burke@BurkeSmithLaw.com  
and

Alexander H. Burke  
Burke Law Offices, LLC  
155 N. Michigan Ave., Suite 9020  
Chicago, IL 60601  
(312) 729-5288  
(312) 729-5289 (fax)  
Email: ABurke@BurkeLawLLC.com

**ATTORNEYS FOR PLAINTIFF AND  
THE PUTATIVE CLASS**

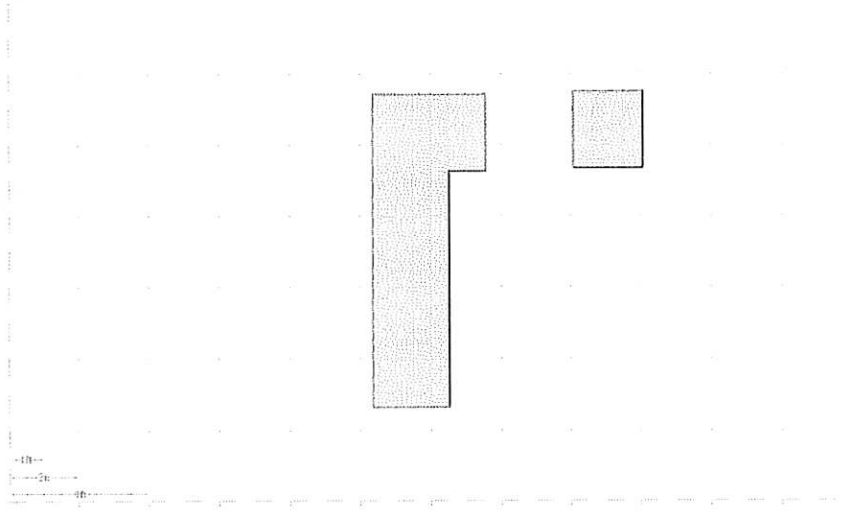
**DOCUMENT PRESERVATION DEMAND**

Plaintiff hereby demands that defendant take affirmative steps to preserve all records

# **EXHIBIT A**

# COUNTERTOP QUOTE REQUEST

A customer from **Omaha, NE** has requested a granite countertop quote through the Marble.com website. You can get more details on this job and contact the customer by visiting **LS.MARBLE.COM**. You can also find more jobs in your area.

PROJECT DETAILS									
	<b>CUSTOMER INFO:</b>								
	<table border="1"> <tr> <td>Name</td> <td>On file</td> </tr> <tr> <td>Address</td> <td>Omaha, NE 68144</td> </tr> <tr> <td>Phone</td> <td>On file</td> </tr> <tr> <td>Email</td> <td>On file</td> </tr> </table>	Name	On file	Address	Omaha, NE 68144	Phone	On file	Email	On file
Name	On file								
Address	Omaha, NE 68144								
Phone	On file								
Email	On file								
	<b>PROJECT INFO:</b>								
	<table border="1"> <tr> <td>Type</td> <td>Kitchen</td> </tr> <tr> <td>Surface</td> <td>26 sq.ft.</td> </tr> <tr> <td>Bsplash</td> <td>0 l.ft.</td> </tr> <tr> <td>Edge</td> <td>12 l.ft.</td> </tr> </table>	Type	Kitchen	Surface	26 sq.ft.	Bsplash	0 l.ft.	Edge	12 l.ft.
Type	Kitchen								
Surface	26 sq.ft.								
Bsplash	0 l.ft.								
Edge	12 l.ft.								

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